Mierzejewski v Russo
2019 NY Slip Op 32958(U)
October 8, 2019
Supreme Court, Suffolk County
Docket Number: 5110/2015
Judge: William G. Ford
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SHORT FORM ORDER

INDEX NO.: 5110/2015

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

x

RALPH MIERZEJEWSKI,

Plaintiff,

-against-

ALEXIA D. RUSSO & MARGARET HENDERSON,

Defendant.

x

Motion Submit Date: 06/06/19
Mot Seq 002MG; RTC
Mot Seq 003MD

PLAINTIFF'S COUNSEL:
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Read on plaintiff's motion for partial summary judgment on liability pursuant to CPLR 3212 and further to strike defendant's answer for willful and contumacious refusal to provide discovery pursuant to CPLR 3126, the Court considered the following papers:

1. Notice of Motion, Affirmation in Support and other supporting papers;
2. Notice of Cross-Motion, Affirmation in Support and other supporting papers; and upon due deliberation and full consideration of all of the same; it is

ORDERED that plaintiff's motion seeking partial summary judgment as to liability pursuant to CPLR 3212 against defendant is **granted** as follows; and it is further

ORDERED that defendant Henderson's cross-motion for summary judgment on liability dismissing the complaint and action as against her is **denied** for the reasons that follow; and it is further

ORDERED that counsel for the parties make their ready appearance the previously scheduled compliance conference for **November 12, 2019** ready to certify discovery as complete in this matter and that it is ready for trial; and it is further

ORDERED that plaintiff's counsel is hereby directed to serve a copy of this decision and order with notice of entry on defense counsel electronically and via email; and it is further

ORDERED that, if applicable, within 30 days of the entry of this decision and order, that defendant's counsel is also hereby directed to give notice to the Suffolk County Clerk as required

by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be required.

BACKGROUND & POSTURE

On March 23, 2015, plaintiffs commenced this personal injury negligence action against defendants arising out of a motor vehicle collision which occurred on September 4, 2014 on Route 27A at or near its intersection with South Carll Avenue in Babylon, Suffolk County, New York. By the pleadings filed, plaintiff seeks damages for personal injury premised on defendants negligence as a proximate cause of the underlying motor vehicle collision and attendant alleged serious injuries. Defendant Russo joined issue filing an answer to the complaint on July 8, 2015. Discovery commenced with the entry of a preliminary conference order on November 10, 2015 and the matter has since appeared before this Court on the compliance conference calendar for the purpose of monitoring pretrial disclosure. Presently, plaintiff moves for an award of partial summary judgment on liability and also for a discovery sanction striking defendant Russo's answer for willful and contumacious refusal to produce discovery.

In support of the application, plaintiff submits a copy of the pleadings, a certified transcript of plaintiff's examination before trial, and a copy of the preliminary conference order. By his deposition testimony at an examination before trial held on March 31, 2016, plaintiff testified that on September 4, 2014 at approximately 11:00 a.m. he operated his 2007 Dodge Durango SUV in sunny, dry and clear weather on dry roads travelling home on Montauk Highway. Immediately prior to collision, plaintiff stated his vehicle was stopped for approximately 20-30 seconds at a red light-controlled intersection of Montauk Highway and South Carll Avenue with 1 vehicle in traffic ahead of him. While stopped in traffic in this fashion with his foot on his vehicle's brake pedal, plaintiff testified that his vehicle was struck in the rear by a vehicle operated by defendants pushing his vehicle forward 10-15 feet.

Defendant Henderson also cross-moves for summary judgment dismissing the complaint as against her. In support of her application, she submits a certified transcript of her examination before trial, as well as a certified transcript of the deposition taken of non-party witness Kyle Henderson.

By her deposition testimony taken on May 30, 2017, defendant Henderson stated that she owned a Honda Civic vehicle involved in a collision with plaintiff's vehicle on September 4, 2014. She further testified that despite owning that vehicle, on the date and time in question, she was generally unaware who operated the vehicle at the time of the incident. After the incident, she came to learn that defendant Russo was the operator who collided with plaintiff's vehicle, the police having contacted her husband to inform her of the occurrence and Russo and her son's involvement.

Henderson further stated that her codefendant Russo was her son, non-party Kyle Henderson's girlfriend. Henderson asserted that to the best of her knowledge defendant Russo had not operated her vehicle prior to the date of the incident. Further, she testified that Russo did not reside with her or her son prior. Henderson's vehicle was located at her residence. Her son Kyle resided in Selden, Suffolk County, New York. She denied that Kyle had copies of her car keys or that he had ever operated her vehicle previously. Further, he was not aware of her

husband giving Kyle permission to operate her vehicle. Thus, on the date of the incident, Henderson found it "unusual" that her vehicle was not parked in her residence's driveway as was her custom. She also observed that her keys were missing from her house. However, she did testify that on the date of the incident her son Kyle and his girlfriend Russo had stayed at her residence, Henderson having picked them up and brought them there. Moreover, she stated that the two of them had disappeared from her house while she was in the shower. By her estimation, 2 hours elapsed from first discovering her car missing and her husband learning from police that the incident involving her vehicle occurred. All that time, Henderson stated she attempted calling Kyle with mixed success. She testified that in between hanging up on her and answering the phone, she conveyed to Kyle that she was displeased with his taking of her car and threatened to call the police. In response, she stated that Kyle indicated he would return with her vehicle after picking up "shower shoes and deodorant" at the corner drugstore.

When deposed on July 19, 2017, nonparty Kyle Henderson testified that on the date of subject incident he resided in Selden. Mr. Henderson's highest attainment of education was the 10th grade. He has been convicted of a crime on a few occasions for drug possession and driving without a license as recently as 2014. Since 2014, he has had pending criminal charges for driving without a license and drug possession as well. He stated that defendant Russo is the mother of 2 of his children. He further testified that due to an unrelated incident he sustained head trauma which has affected his memory and recall. Thus, beyond recalling having been involved in the collision on September 4, 2014, Henderson had little memory of the time of day it occurred or the location of the incident.

His testimony disputed his mother's account in that he recalled being dropped off at her house by a friend with Russo. He testified that he and Russo were dropped at his mother's house for the purpose of Mrs. Henderson driving them to the hospital for a detox/rehab program at South Oaks Hospital. At some point, Henderson decided he wanted to leave his mother's house with Russo, and he took his mother's keys to her Honda Civic. He did not ask his mother for permission to operate her vehicle stating she would never have permitted so since he did not have a valid driver's license. However, Henderson did testify that when he did have a valid driver's license previously, his mother would allow him to use her car, possibly a year or two prior to the subject incident. He did agree that he did not have keys to his mother's home. Henderson did not know whether defendant Russo had a valid driver's license on the date of the incident. He did not recall receiving phone calls from his mother prior to the incident, however he did recall that prior to the incident he and Russo were headed to the store. Henderson had a recollection of going into his mother's pocketbook to retrieve her car keys. He denies having been the operator of the vehicle that collided with plaintiff, having not had a valid driver's license, and recalling that Russo drove since she did not like his driving, that being an issue the two fought about. To his knowledge, Russo only drove his mother's vehicle on that one occasion.

Relying upon his sworn deposition testimony, plaintiff seeks partial summary judgment on liability arguing that defendants' are liable as the proximate cause for the incident having initiated a rear-end collision with his vehicle stopped at a red light. Defendant Henderson, the owner of the alleged offending vehicle involved, also cross-moves for summary judgment on liability to dismiss the complaint as against her arguing that the record establishes that codefendant Russo did not have permission to operate her vehicle and thus her own culpable conduct establishes her liability and demonstrates that Henderson has not liability for the subject

incident.

For her part, defendant Russo opposes plaintiff's motion for partial summary judgment arguing that the motion is premature under CPLR 3212(f), her deposition outstanding. Further, relying upon her counsel's affirmation, she argues triable issues of fact concerning liability preclude entry of judgment as a matter of law. Further, Russo argues that her answer should not be stricken, but rather, if any discovery sanction should be imposed on a finding of willful and contumacious failure to provide demanded discovery, that she should be precluded from offering testimony at the most. All of the parties' respective arguments are addressed below.

STANDARDS OF REVIEW

The motion court's role on review of a motion for summary judgment is issue finding, not issue determination (***Trio Asbestos Removal Corp. v Gabriel & Sciacca Certified Pub. Accountants, LLP***, 164 AD3d 864, 865, 82 NYS3d 127, 129 [2d Dept 2018]). The court should refrain from making credibility determinations (***Gniewek v Consol. Edison Co.***, 271 AD2d 643, 643, 707 NYS2d 871 [2d Dept 2000]).

It is well settled that summary judgment is a drastic remedy which should not be granted when there is doubt as to the existence of a triable issue of fact. Where, however, one seeking summary judgment tenders evidentiary proof in admissible form establishing its defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, the burden falls upon the opposing party to show, also by evidentiary proof in admissible form, that there is a material issue of fact requiring a trial of the matter (*see* ***Zuckerman v. City of New York,*** 49 NY2d 557, 562, 427 NYS2d 595 [1980]). The evidence presented on a motion for summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*see* ***Goldstein v. Monroe County,*** 77 AD2d 232, 236, 432 NYS2d 966 [1980]).

The proponent on a motion of summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985];]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see* ***Zuckerman***, *supra*). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (***Pantote Big Alpha Foods, Inc. v Schefman,*** 121 AD2d 295, 503 NYS2d 58 [1st Dept. 1986]).

The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289AD2d 557, 735 NYS2d 197 [2d Dept. 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept. 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept. 1987]). The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see* ***Andre v Pomeroy,*** 35 NY2d 361, 362 NYS2d 131 [1974]; ***Benincasa v Garrubo,*** 141 AD2d 636, 529 NYS2d 797 [2d Dept. 1988]).

However, whereas here, the non-movant fails to oppose a motion for summary judgment, there is, in effect, a concession that no question of fact exists, and the facts as alleged in the moving papers may be deemed admitted (***Kuehne & Nagel v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]).

DISCUSSION

The plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, *prima facie*, that the defendants breached a duty owed to the plaintiff and that the defendants' negligence was a proximate cause of the alleged injuries (***Montalvo v Cedeno***, 170 AD3d 1166 [2d Dept 2019]; *accord* ***Buchanan v Keller***, 169 AD3d 989, 991, 95 NYS3d 252, 254 [2d Dept 2019][holding that plaintiff-movant seeking summary judgment on liability is no longer required to show freedom from comparative fault in order to establish prima facie entitlement to judgment as a matter of law]; *quoting* ***Rodriguez v. City of New York***, 31 NY3d 312 [2018]).

A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle and imposes a duty on the operator to rebut the inference of negligence by providing a non-negligent explanation for the collision" (***Mulhern v Gregory***, 161 AD3d 881, 883, 75 NYS3d 592, 594 [2d Dept 2018]; ***Comas-Bourne v City of New York***, 146 AD3d 855, 856, 45 NYS3d 182, 183 [2d Dept 2017]; ***Whelan v Sutherland***, 128 AD3d 1055, 1056, 9 NYS3d 639, 640 [2d Dept 2015]; ***Tutrani v. County of Suffolk***, 10 NY3d 906, 908; ***Gutierrez v. Trillium USA, LLC***, 111 AD3d 669, 670–671, 974 NYS2d 563; ***Pollard v. Independent Beauty & Barber Supply Co.***, 94 AD3d 845, 846, 942 NYS2d 360; ***Perez v Roberts***, 91 AD3d 620, 621, 936 NYS2d 259, 260 [2d Dept 2012]; ***Le Grand v Silberstein***, 123 AD3d 773, 774, 999 NYS2d 96, 97 [2d Dept 2014]).

The claim that the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence on the part of the following vehicle (*see* ***Zdenek v Safety Consultants, Inc.***, 63 AD3d 918, 918, 883 NYS2d 57, 58 [2d Dept 2009]; ***Kastritsios v. Marcello***, 84 AD3d 1174, 923 NYS2d 863; ***Franco v. Breceus***, 70 AD3d 767, 895 NYS2d 152; ***Mallen v. Su***, 67 AD3d 974, 890 NYS2d 79; ***Rainford v. Han***, 18 AD3d 638, 795 NYS2d 645; ***Russ v. Investech Secs.***, 6 AD3d 602, 775 NYS2d 867; ***Xian Hong Pan v Buglione***, 101 AD3d 706, 707, 955 NYS2d 375, 377 [2d Dept 2012]). However, "[i]f the operator cannot come forward with any evidence to rebut the inference of negligence, the plaintiff may properly be awarded judgment as a matter of law" (***Barile v. Lazzarini***, 222 AD2d 635, 636, 635 NYS2d 694; ***D'Agostino v YRC, Inc.***, 120 AD3d 1291, 1292, 992 NYS2d 358, 359 [2d Dept 2014]).

"When the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his vehicle, and to exercise reasonable care to avoid colliding with the other vehicle" (***Comas-Bourne v City of New York***, 146 AD3d 855, 856, 45 NYS3d 182, 183 [2d Dept 2017]). Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident (***Williams v Spencer-Hall***, 113 AD3d 759, 760, 979 NYS2d 157, 159 [2d Dept 2014]). a rear-end collision with a stopped vehicle creates a prima facie case of liability with respect to the operator of the rearmost vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision (***Sayyed v Murray***, 109 AD3d 464, 464, 970 NYS2d 279, 281 [2d Dept 2013]).

A possible non-negligent explanation for a rear-end collision could be the sudden stop of the lead vehicle," however, it is equally true that "vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead" (***Tumminello v City of New York***, 148 AD3d 1084, 1085, 49 NYS3d 739, 741 [2d Dept 2017]; ***Shamah v. Richmond County Ambulance Serv.***, 279 A.D.2d 564, 565, 719 N.Y.S.2d 287; *see* ***Gutierrez v Trillium USA, LLC***, 111 AD3d 669, 671, 974 NYS2d 563, 566 [2d Dept 2013]; ***Robayo v. Aghaabdul,*** 109 A.D.3d 892, 893, 971 N.Y.S.2d 317). Even assuming that a lead vehicle stopped short or suddenly, following vehicles should not escape liability for an assumed failure to maintain a proper or safe following distance under the presented circumstances, where the record presents a scenario with triable questions of fact ripe for jury determination, rather than summary determination on the law (*see e.g.* ***Romero v Al Haag & Son Plumbing & Heating, Inc.***, 113 AD3d 746, 747, 978 NYS2d 895, 896 [2d Dept 2014][even assuming that the defendant driver failed to maintain a reasonably safe distance and rate of speed while traveling behind the plaintiff's vehicle under Vehicle and Traffic Law § 1129[a], defendant's deposition testimony relied upon by plaintiff, itself raised a triable issue of fact on whether the plaintiff contributed to the accident by driving in an erratic manner]; *accord* ***Fernandez v Babylon Mun. Solid Waste***, 117 AD3d 678, 679, 985 NYS2d 289, 290 [2d Dept 2014][under circumstances where plaintiff came to an abrupt stop for no apparent reason resulting in a collision, a triable issue of fact exists]; ***Sokolowska v Song***, 123 AD3d 1004, 1004, 999 NYS2d 847, 848 [2d Dept 2014]).

Thus, the burden is placed on the driver of the offending vehicle, as he or she is in the best position to explain whether the collision was due to a mechanical failure, a sudden stop of the vehicle ahead, unavoidable skidding on wet pavement, or some other reasonable cause (*see* ***Abbott v Picture Cars E., Inc.***, 78 A.D.3d 869, 911 N.Y.S.2d 449 [2d Dept 2010]; ***DeLouise v S.K.I. Wholesale Beer Corp.***, 75 A.D.3d 489, 904 N.Y.S.2d 761 [2d Dept 2010]; ***Moran v Singh***, 10 A.D.3d 707, 782 N.Y.S.2d 284 [2d Dept 2004]).

Here, having reviewed his moving papers, the Court finds that plaintiff has met his *prima facie* burden for entitlement to summary judgment on liability based on the submission of her sworn testimony which demonstrates a *prima facie* case of negligence against the defendant. Thus, the burden has shifted to defendants to come forward with a non-negligent explanation for the incident.

Arguing in opposition to an award of partial summary judgment on liability, first Russo's counsel argues that plaintiff's motion is premature under CPLR 3212(f), Russo having yet to be deposed. This argument is not persuasive and is legally insufficient to preclude entry of summary judgment in plaintiff's favor.

A summary judgment motion coming before the close of pretrial disclosure may be determined premature and thus denied (***Adrianis v Fox***, 30 AD3d 550, 550–51, 817 NYS2d 374, 375 [2d Dept 2006][holding that a motion court properly denies a partial liability summary judgment motion as premature where at least one party's deposition was still outstanding, and the parties had previously stipulated to hold that deposition only seven days after the motion was made]). Put differently, defendant's argument that she has been unfairly deprived the opportunity to fully probe and pursue the merits of affirmative defenses without the benefit of

party depositions may warrant denial of a premature application (*see* ***Amico v Melville Volunteer Fire Co., Inc.***, 39 AD3d 784, 785, 832 NYS2d 813 [2d Dept 2007][resolving that a party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment]).

By the same token, the Second Department is clear that defendant's mere hope or speculation that additional discovery might lead to or create a triable fact issue is insufficient to preclude the entry of summary judgment on liability in this negligence motor vehicle action (*see e.g.* ***Rodriguez v Farrell***, 115 AD3d 929, 931, 983 NYS2d 68, 70 [2d Dept 2014][appellate court determining that summary judgment not premature where defendant failed to demonstrate that discovery would lead to relevant evidence or that facts essential to justify opposition to the motions were exclusively within the knowledge and control of the plaintiffs]; ***Medina v Rodriguez***, 92 AD3d 850, 851, 939 NYS2d 514, 515 [2d Dept 2012]; ***Kimyagarov v Nixon Taxi Corp.***, 45 AD3d 736, 737, 846 NYS2d 309, 310–11 [2d Dept 2007]; ***Hill v Ackall***, 71 AD3d 829, 829–30, 895 NYS2d 837, 838 [2d Dept 2010]).

Therefore, a party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated." ***Chmelovsky v. Country Club Homes, Inc.***, 106 AD3d 684, 964 NYS2d 245, 246 [2d Dept 2013]; ***Martinez v. 305 W. 52 Condo.***, 128 AD3d 912, 914, 9 NYS3d 375, 377 [2d Dept 2015]["A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment"]). The non-movant should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment (*see* ***Video Voice, Inc. v. Local T.V., Inc.,*** 114 AD3d 935, 980 NYS2d 828; ***Bank of Am., N.A. v. Hillside Cycles, Inc.,*** 89 AD3d 653, 932 NYS2d 128; ***Venables v. Sagona,*** 46 AD3d 672, 673, 848 NYS2d 238). Further, non-movant is also entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated (*see* CPLR 3212[f]; ***Nicholson v. Bader,*** 83 AD3d 802, 920 NYS2d 682; ***Family-Friendly Media, Inc. v. Recorder Tel. Network,*** 74 AD3d 738, 739, 903 NYS2d 80; ***Juseinoski v. New York Hosp. Med. Ctr. of Queens,*** 29 AD3d 636, 637, 815 NYS2d 183). ***Malester v. Rampil***, 118 A.D.3d 855, 856, 988 N.Y.S.2d 226, 227-28 [2d Dept 2014]).

Under CPLR 3212(f), "where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied.... This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion" (***Juseinoski v. New York Hosp. Med. Ctr. of Queens***, 29 AD3d 636, 637, 815 NYS2d 183, 184-85 [2d Dept 2006]; ***Baron v. Inc. Vil. of Freeport,*** 143 AD2d 792, 92-93; 533 NYS2d 143, 148 [2d Dept 1998]).

Here, defendant's mere conclusions are insufficient to warrant denial of summary judgment. More to the point, it is clear that defendant's own conduct or failure to abide her discovery obligations constitutes the outstanding discovery. Thus, this Court will not countenance such double dealing on the defendant's part. Her alleged willful and contumacious refusal to participate in pretrial disclosure cannot also serve as a basis to prevent judgment as a matter of liability, particularly where the Court of Appeals has made clear that post ***Rodriguez*** freedom from comparative fault no longer should serve as a barrier from resolving liability in a rear-end collision context.

Moreover, defendant Russo's opposition consists solely of her counsel's affirmation in opposition. The law in this regard is settled. Defendant's' reliance on her attorney's affirmation, without further submission of sworn testimony by any competent witness with direct personal or firsthand knowledge of the facts and circumstances underlying the subject accident, is insufficient to establish triable issues of fact warranting denial of summary judgment. The Second Department has repeatedly cautioned counsel on this point (***Huerta v Longo***, 63 AD3d 684, 685, 881 NYS2d 132, 133 [2d Dept 2009]; ***Collins v Laro Serv. Sys. of New York, Inc.***, 36 AD3d 746, 746–47, 829 NYS2d 168, 169 [2d Dept 2007][attorney's affirmation, together with inadmissible hearsay documents insufficient to warrant denial of the motion]; ***Cordova v Vinueza***, 20 AD3d 445, 446, 798 NYS2d 519, 521 [2d Dept 2005][attorney's affirmation offering speculation unsupported by any evidence insufficient to raise a triable issue of fact]).

Thus, defendant fails to carry her shifted burden of rebutting plaintiff's *prima facie* case of negligence against her by competent or admissible proof raising a triable question of fact meriting a liability trial and precluding judgment as a matter of law on liability for the plaintiff.

Accordingly, because defendant Russo has failed to come forward with competent and admissible proof demonstrating triable issues of fact or non-negligent explanations for the collision here, necessitating a trial on her liability, this Court **grants** plaintiffs partial summary judgment on liability against defendant Russo under CPLR 3212.

As regards defendant Henderson, the analysis differs and merits a wholly different result. On her claim that she bears no responsibility for the subject incident, having merely owned the involved and alleged offending vehicle, but having not consented to or permitted her co-defendant/tortfeasor's operation, the law provides as a general matter that such an owner of a vehicle, is statutorily liable for an accident under Vehicle and Traffic Law § 388, but may be indemnified by a negligent user (***Ciatto v Lieberman***, 1 AD3d 553, 556, 769 NYS2d 48, 51 [2d Dept 2003]). Thus, Vehicle and Traffic Law § 388(1) provides that as relevant here that the owner of a motor vehicle shall be liable for the negligence of one who operates the vehicle with the owner's express or implied consent. By its plain meaning, the statute creates a presumption that the driver was using the vehicle with the owner's express or implied permission, which only may be rebutted by substantial evidence sufficient to show that the vehicle was not operated with the owner's consent (***Fuentes v Virgil***, 119 AD3d 522, 522-23, 989 NYS2d 498, 499 [2d Dept 2014]; *see also* ***Panteleon v Amaya***, 85 AD3d 993, 994, 927 NYS2d 85, 86 [2d Dept 2011][it is presumed that an operator drives a vehicle with the owner's express or implied consent; this presumption is rebuttable on "substantial evidence" sufficient to show that the vehicle was not operated with the owner's consent]).

However, "[t]he uncontradicted testimony of a vehicle owner that the vehicle was operated without his or her permission, does not, by itself, overcome the presumption of permissive use " (***Blassberger v Varela***, 129 AD3d 756, 757, 11 NYS3d 238, 240 [2d Dept 2015]). The question of consent is ordinarily one for the jury (***Marino v City of New York***, 95 AD3d 840, 841, 943 NYS2d 564, 566 [2d Dept 2012]).

Here, the motion record does not necessarily present a clear paradigm of blamelessness for defendant Henderson. Her testimony and that of her non-party son's is consistent that she did not expressly permit his use or that of her codefendant Russo. Further, Mr. Henderson made clear that he did not have a valid driver's license and that he was under the impression his mother

would not have permitted him to operate her vehicle. Further, Russo and Mr. Henderson were driven to Mrs. Henderson's residence, whether by her or someone else prior to the subject incident. Nevertheless, Mr. Henderson did testify that he knew where to find his mother's keys in her house, and that given his issues with drugs, he found it odd for to leave her pocketbook out in the open unattended. Further, although Mrs. Henderson testified that Russo and her son disappeared while she was in the shower, she provided no clear testimony on what efforts she took to report her vehicle missing in the approximate 2 hours from her discovery to her husband's learning of the incident from the police. Mrs. Henderson did state she called her son on several occasions, some attempts being successful, and that she further learned Russo and he left the house with her vehicle to purchase some items at the "corner drugstore." But the context here is crucial: Mrs. Henderson brought her son and his girlfriend to her house to transport them to drug rehabilitation/detoxification. She did not trust her son to operate her vehicle, but by the same token felt comfortable to leave him and his girlfriend unsupervised in her home.

Given the resulting muddy picture all of the testimony, and in view of precedent holding that resolution of the permissive use question is one relegated to the finder of fact, this Court **denies** defendant Henderson's motion for summary judgment as material triable issues of fact warrant trial before a jury.

Lastly, before the Court is plaintiff's motion to preclude defendant Russo's testimony come time of trial on the basis that she has never been produced for an examination before trial during the conduct of discovery in this case. As noted previously, the parties' preliminary conference order issued in this matter in November 2015. Since then this matter has made over 20 appearances before this Court's discovery compliance conference calendar. The time for discovery to conclude has certainly come.

It is well settled that a trial court is vested with broad discretion to supervise the discovery process, and its determinations in that respect will not be disturbed in the absence of demonstrated abuse (*see* ***United Airlines v. Ogden New York Servs.***, 305 AD2d 239, 240, 761 NYS2d 16; ***Cho v. 401–403 57th St. Realty Corp.***, 300 AD2d 174, 176, 752 NYS2d 55***); Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker***, 1 AD3d 223, 224, 767 NYS2d 228 [1st Dept. 2003]). However, the courts on the other hand recognized that "parties to a civil dispute are free to chart their own litigation course and, in so doing, they may stipulate away statutory, and even constitutional rights' " (***Astudillo v MV Transp., Inc.***, 136 AD3d 721, 721, 25 NYS3d 289, 290 [2d Dept 2016]). Thus, it has often been said that for "the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (***Jones v LeFrance Leasing Ltd. Partnership***, 110 AD3d 1032, 1033, 973 NYS2d 798, 800 [2d Dept 2013]).

The test to be employed by the Supreme Court when determining discovery issues is one based on usefulness and reason (*see* ***Andon v. 302–304 Mott St. Assoc.***, 94 NY2d 740, 746, 709 NYS2d 873). However, discovery demands which are unduly burdensome, lack specificity, or seek privileged and/or irrelevant information are improper and will be vacated (*see* ***Board of Mgrs. of the Park Regent Condominium v. Park Regent Assoc.***, 78 AD3d 752, 753, 910 NYS2d 654; ***Bell v. Cobble Hill Health Ctr., Inc.***, 22 AD3d 620, 621, 804 NYS2d 362; ***Lopez v. Huntington Autohaus***, 150 AD2d 351, 352, 540 NYS2d 874; ***H.R. Prince, Inc. v Elite Envtl. Sys., Inc.***, 107 AD3d 850, 850, 968 NYS2d 122, 123–24 [2d Dept 2013])

It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (***Crazytown Furniture v. Brooklyn Union Gas Co.***, 150 AD2d 420, 421, 541 NYS2d 30; *see* Seigel, N.Y. Prac. § 345; CPLR 3101[a]; ***Herbst v. Bruhn***, 106 AD2d 546, 483 NYS2d 363; ***Andon v. 302–304 Mott St. Assocs.***, 94 NY2d 740, 746, 709 NYS2d 873; ***Palermo Mason Constr. v. AARK Holding Corp.***, 300 AD2d 460, 751 NYS2d 599; ***Vyas v Campbell***, 4 AD3d 417, 418, 771 NYS2d 375, 376 [2d Dept 2004]).

Generally, "public policy strongly favors the resolution of actions on the merits whenever possible, the striking of a party's pleading is a drastic remedy which is warranted only where there has been a clear showing that the failure to comply with discovery is willful and contumacious" (***Desiderio v Geico Gen. Ins. Co.***, 153 AD3d 1322, 1322, 61 NYS3d 309, 311 [2d Dept 2017]). On an application seeking striking of a party's pleading for refusal to comply with a court's discovery order, movant bears the burden of making a "clear showing" that the failure to comply was willful and contumacious (***Singer v Riskin***, 137 AD3d 999, 1001, 27 NYS3d 209, 211–12 [2d Dept 2016][internal citations omitted]).

A party's refusal "to obey an order for disclosure or willfully fail[ure] to disclose information which the court finds ought to have been disclosed ... the court may ... strik[e] out pleadings ... or dismiss[ ] the action ... or render[ ] a judgment by default against the disobedient party" (CPLR 3126[3]). "While actions should be resolved on the merits when possible, a court may strike [a pleading] upon a clear showing that [a party's] failure to comply with a disclosure order was the result of willful and contumacious conduct." "Willful and contumacious conduct may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply, or a failure to comply with court-ordered discovery over an extended period of time (***Honghui Kuang v MetLife***, 159 AD3d 878, 881, 74 NYS3d 88, 92 [2d Dept 2018]).

The failure to comply with deadlines and provide good-faith responses to discovery demands "impairs the efficient functioning of the courts and the adjudication of claims." The Court of Appeals has also pointed out that "[c]hronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules" and has also remarked that "[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity (***Arpino v F.J.F. & Sons Elec. Co., Inc.***, 102 AD3d 201, 207, 959 NYS2d 74, 79 [2d Dept 2012]).

The nature and degree of the penalty to be imposed pursuant to CPLR 3126 is a matter within the discretion of the trial court (***Estaba v Quow***, 101 AD3d 940, 940-41, 956 NYS2d 143, 144 [2d Dept 2012]). The drastic remedy of striking an answer is not appropriate absent a clear showing that the failure to comply with discovery demands was willful or contumacious (***JPMorgan Chase Bank, N.A. v New York State Dept. of Motor Vehicles***, 119 AD3d 903, 903, 990 NYS2d 577, 578-79 [2d Dept 2014]).

The striking of a pleading may be appropriate where there is a clear showing that the failure to comply with discovery demands or court-ordered discovery is willful and contumacious. The willful and contumacious character of a party's conduct can be inferred from the party's repeated failure to comply with discovery demands or orders without a reasonable

excuse (***Mears v Long***, 149 AD3d 823, 823-24, 52 NYS3d 124, 125 [2d Dept 2017]).

It is clear that the willful and contumacious nature of a party's conduct may properly be inferred from repeated delays in complying with the plaintiff's discovery demands and the Supreme Court's discovery schedule, the failure to provide an adequate excuse for such delays, and the proffer of inadequate discovery responses, which otherwise evince a lack of a good-faith effort to address the requests meaningfully (***Studer v Newpointe Estates Condominium***, 152 AD3d 555, 557, 58 NYS3d 509, 512 [2d Dept 2017]; ***Schiller v Sunharbor Acquisition I, LLC***, 152 AD3d 812, 813, 60 NYS3d 79, 81 [2d Dept 2017]; ***Henry v Datson***, 140 AD3d 1120, 1122, 35 NYS3d 383, 385 [2d Dept 2016]; ***Stone v Zinoukhova***, 119 AD3d 928, 929, 990 NYS2d 567, 568 [2d Dept 2014]; ***H.R. Prince, Inc. v Elite Envtl. Sys., Inc.***, 107 AD3d 850, 851, 968 NYS2d 122, 124 [2d Dept 2013]; ***Silberstein v Maimonides Med. Ctr.***, 109 AD3d 812, 814, 971 NYS2d 167, 169 [2d Dept 2013]).

Given the history adduced above, this Court finds adequate evidence of willful and contumacious failure to provide discovery on defendant Russo's part. Moreover, with defendant's silence failure to oppose the pending application, this Court is convinced that no reasonable excuse exists for defendant's failures to abide her discovery obligations in this litigation.

Accordingly, this Court **grants** plaintiff's application in the following manner:

It is

ORDERED that premised upon plaintiff's demonstration of defendant Alexia D. Russo's willful and contumacious failure to participate in pretrial disclosure and to be produced for a deposition in this matter, defendant Russo is now **precluded** from offering any testimony concerning liability or damages come time of trial in this action.

The foregoing constitutes the decision and order of this Court.

Dated: October 8, 2019
Riverhead, New York

WILLIAM G. FORD, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**